

IN THE COURT OF APPEALS OF IOWA

No. 9-1054 / 09-0720
Filed February 24, 2010

**THE BANK OF NEW YORK MELLON
FORMERLY KNOWN AS THE BANK OF
NEW YORK AS SUCCESSOR TRUSTEE TO
JP MORGAN CHASE BANK, NATIONAL
ASSOCIATION AS TRUSTEE FOR THE
CERTIFICATE HOLDERS OF STRUCTURED
ASSET MORTGAGE INVESTMENTS II, INC.
APPLICATION FOR BEAR STEARNS ALT-A
TRUST, MORTGAGE PASS-THROUGH
CERTIFICATE SERIES 2006-1,**
Plaintiff-Appellee,

vs.

RODNEY V. FOSTER, et al.,
Defendants-Appellants.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

Rodney Foster appeals from the district court ruling denying his combined motions seeking to set aside a sheriff's sale, stay enforcement of a foreclosure judgment, and to set aside the judgment and retry the foreclosure action.

AFFIRMED.

Gregory F. Greiner of Heronimus, Schmidt & Allen, Grundy Center, for appellants.

Teresa A. Rastede and Brian Sayer of Dunakey & Klatt, P.C., Waterloo, for appellee.

Considered by Eisenhauer, P.J., and Potterfield, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

HUITINK, S.J.

Rodney Foster appeals from the district court ruling denying his combined motions seeking to set aside a sheriff's sale, stay enforcement of a foreclosure judgment, and to set aside the judgment and retry the foreclosure action. He contends the court erred in setting aside the foreclosure judgment, claiming he did not waive his homestead rights and the lender did not make diligent efforts to serve him with notice and the petition. He seeks a new trial on the foreclosure action.

Our review of cases tried in equity is de novo. *Kuehl v. Eckhart*, 608 N.W.2d 475, 477 (Iowa 2000). Courts are thus afforded some flexibility in determining the equities between the parties. *Id.* Such courts are, however, bound by statute, and in the absence of fraud or mistake, equity must follow the law. *Id.*

Foster purchased the real estate in question in 1987. Foster failed to make payments on the mortgage for a period of time and in August 2008 was mailed a Notice to Cure, stating he was \$21,509.38 delinquent. On October 7, 2008, after Foster failed to make further payment on his debt, a foreclosure action was initiated.

Personal service was attempted, as was service by mail and publication. Foster never answered in the foreclosure action. On December 18, 2008, the district court entered a foreclosure decree. On January 15, 2009, a special execution to sell the property at sheriff's sale was requested. Foster was personally served with notice of the sale on January 22, 2009. The sale occurred

on March 4, 2009, and on March 16, 2009, Foster filed a motion to set aside the sheriff's sale, to stay enforcement of the foreclosure judgment, and to set aside the judgment and retry the action. After an April 29, 2009 hearing, the district court denied the motions.

We first address Foster's claim the plaintiff did not conduct a diligent search to have him served with the notice and petition in the foreclosure action. Iowa Rule of Civil Procedure 1.305 requires original notices to be "served" by delivering a copy to the proper person. Although generally this is obtained by personal delivery, the Iowa Rules of Civil Procedure also allow notice to be served by publication in mortgage foreclosure actions. Iowa R. Civ. P. 1.310(3).

We conclude the plaintiff made reasonable efforts to serve Foster. Personal service was attempted twice the day the foreclosure action was filed. A process server placed notes on every door of the property in question stating he was in possession of legal documents to serve on the property owner and providing contact information. After returning to the property three more times without avail, the process server determined the property was vacant and returned an affidavit stating service could not be obtained in Iowa. Notice was published in the Waterloo Courier on October 23, 2008, October 30, 2008, and November 6, 2008. Additionally, Foster was mailed notice at the address of the real estate in question. The district court found Foster's claims he never saw the notes left at the residence or received the mailed notice were not credible. We defer to this finding. Iowa R. App. P. 6.904(3)(g).

Despite the fact service was made, Foster never participated in the foreclosure action. Default judgment was entered against him. Foster had sixty days after entry of the judgment to make a motion to set aside default. Iowa R. Civ. P. 1.977. He failed to raise any claims regarding his homestead rights or defects in the mortgage contract until after the sheriff's sale, more than sixty days after the default foreclosure was entered. His inaction has waived these claims. Accordingly, we affirm the district court order denying Foster's motions.

AFFIRMED.